Supreme Court, U.S.
FILED
AUG 21
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-7272

In The

Supreme Court of the United States

October Term, 1990

RONALD ALLEN HARMELIN,

Petitioner,

v.

MICHIGAN,

Respondent.

On Writ of Certiorari
To The Court of Appeals of Michigan

JOINT APPENDIX

CARLA J. JOHNSON
Appointed by this Court
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(313) 965-6690

Counsel for Petitioner

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Petition for Writ of Certiorari filed April 2, 1990
Certiorari Granted May 29, 1990

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OAKLAND COUNTY CIRCUIT
COURT, PONTIAC, MICHIGAN

Michigan

v.

Ronald Allen Harmelin

CR 86-73784FH

Complaint: 21703-86
File Class: 3500-5628

LABORATORY REPORT

Laboratory No	:	21703-86
Received By	:	John H. Siefert, Ph.D.
Delivered by	:	Det. Adam Jankowski
Complainant	:	Oak Park Dept. Public Safety 104549
Date Received	:	05-13-86
Time Received	:	12:35 P.M.
Nature of Exam	:	Bot. Chem.
Date Reported	:	05-13-86

Reference:

Violation of Public Health Coide [sic]

Suspect(s):

RONALD ALLEN HARMELIN W/M 02-22-45

Evidence Received:

#1 – Tag #32215

One clear plastic bag holding two sealed brown paper bags –

1a) containing a clear plastic bag holding 187.1 grams of white powder.

1b) containing a clear plastic bag holding a clear plastic bag containing 485.4 grams of white powder.

All of the packaging materials of Item #1 were turned over to Diane K. DeWitt 05-13-86 at 4:15 P.M.

#2 – Tag #32208

One sealed clear plastic bag holding –

2a) a sealed metal case containing 6 hand-rolled cigarettes

2b) a sealed manila coin envelope holding 10 sealed clear plastic bags

2c) 3 clear glass vials each containing a white powder

2d) a sealed clear plastic bag holding 12 yellow "DuPont Percodan" tablets

2e) a sealed clear plastic bag holding 25 two-tone green "BI 64" capsules

Results of Examination:

Examination of the powder of Items #1a and 1b showed it to be cocaine, a Schedule 2, Non-narcotic. No dilutents were detected. The total weight of powder contained in Items #1a and 1b was 672.5 grams.

Examination of one of the cigarettes of Item #2a showed that presence of marihuana, a Schedule 1, Non-narcotic.

Examination of 1the [sic] 0.14 gram of white power [sic] in one of the bags of Item #2b showed the presecne [sic] of cocaine, a Schedule 2, Non-narcotic.

Items #2c, 2d, and 2e were not examined.

/s/ John H. Siefert
John H. Siefert, Ph.D.
Laboratory Scientist

JHS:rk
5-14-86

MICHIGAN DEPARTMENT OF CORRECTIONS
PRESENTENCE INVESTIGATION REPORT

"PROBATION COPY" CFR-14

Honorable Gene Schnelz | County of Oakland | Sentence Date: 4-30-87

Docket CR 86-73784-FC | Attorney: C. Rundell | Appt. | Retained x

Defendant: HARMELIN, Ronald Allen | Age: 42 | D.O.B. 2-22-45

Charge(s)	Max.	Jail Credit	Bond	Proposal B
1. POSSESS CONTROLLED SUBSTANCE OVER 650 GRAMS - COCAINE	Life	353 days	N/F	yes
2. FELONY FIREARM	2 yr.mand.	353 days	N/F	yes

Convicted by: Plea Jury Judge x Plea Under Advisement Nolo Contendere HYTA PDI

Conviction Date: 2-27-87 Plea Agreement: Ct. III, Poss Controlled Substance U/50 Grams, and Ct. IV, Felonious Firearm, dismissed

Pending Charges: none

PRIOR RECORD

Convictions: Felonies: 0 Misdemeanors: 0 Juvenile Record: Yes No x
Probation: Active: Former: Pending Violation:
Parole: Active: Former: Pending Violation:
Current Michigan Prisoner: Yes No x Number:
Currently Under Sentence: no Offense: Sentence:

PERSONAL HISTORY

Education: 12th grade Employed: no Where:
Psychiatric History: Yes No x Physical Handicaps: Yes No x Marital Status: single
Substance Abuse History: Yes x No What: Percodan How Long: since '86

RECOMMENDATION

Incarceration.

Custody: 5-12-86 to 4-29-87.

Agent: Mary E. Asch Caseload No. 270 Date: 4-27-87
MEA/mac
Signature: _____ Supervisor's Approval: _____

EVALUATION AND PLAN

Ronald Allen Harmelin is a forty-two year old male who claims to be single. Born in Pennsylvania, he was raised in New Jersey, where he graduated from high school and subsequently entered the United States Air Force. He has resided in the Detroit area for the past eight years. He has no known legitimate employment, and claims he is a self-employed pool player and courier of gambling money. Defendant denied cocaine and heroin usage, however, admitted to the use of the controlled substance Percodan for approximately five months prior to his arrest in the instant offense.

The defendant has no previous criminal record. He was interviewed in the Oakland County Jail for this investigation, and denied, criminal culpability, claiming he thought he was transporting gambling money. He was unable to provide this writer with family members' addresses. He appeared to be guarded in disclosing information requested of him.

Police investigators described the defendant as a large-scale drug trafficker, delivering down to mid-level dealers.

In accordance with the mandatory statute associated with this conviction, incarceration is recommended.

MICHIGAN DEPARTMENT OF CORRECTIONS
BASIC INFORMATION REPORT

CFJ-101 2/86

IDENTIFICATION DATA

Mich. Prison No.	Court Name (Last, First, Middle) HARMELIN, Ronald Allen		
Mich. Probation No.	Real Name same		Last Known Address, Telephone 20481 Fleming, Det. 48234 #14
Place of Birth Philadeophia, Pa.	Country of Citizenship USA		48234

Date of Birth	Mich. Driver's License No.	Soc. Security No.	MSB No.	FBI No.
2-22-45	H654 744 051 138	136 38 3123	1376739	60733762

Local Police Agency & No.	Physical Problems	Marital Status	Dependents	Highest Grade
	☐ Yes ☒ No	single	0	12th

Race	Sex	Hair	Eyes	Height	Weight	Build	Complex.	Occupation
W	M	blk	bro	6'	190	med	olive	none

Scars, Marks, Tattoos	Health Insurance	Public Assistance	Assets over $1500
	☐ Yes ☒ No	☐ Yes ☒ No	☐ Yes ☒ No

Known Drug Use	Known Alcohol Abuse	Known Homosexual	Mental Health Treatment
☒ Yes ☐ No	☐ Yes ☒ No	☐ Yes ☒ No	☐ Yes ☒ No

Military Ser. No., Branch	From	To	Discharge Type	Religion
U.S.A.F.	'63	'67	Honoratle E-4	Agnostic

CRIMINAL HISTORY

Juvenile			Adult			
Comm.	Prob.	Escape	Jail	Prison	Prob.	Escape
0	0	0	0	0	0	0

Sex Offense Convictions: none

Pending Charges: ☐ Yes ☒ No

CURRENT STATUS

- 0 ☒ None
- 4 ☐ HYTA
- 4 ☐ Probation, circuit
- D ☐ Probation, district
- 3 ☐ Delayed Sentence
- 6 ☐ Parole
- 8 ☐ County Prisoner
- 8 ☐ State Prisoner

CURRENT OFFENSE DATA

NO. 1	NO. 2
Docket No. 86-73784-FC	Docket No. 86-73784-FC
Offense COCAINE POSS CONT. SUB. O/650 GR.	Offense FELONY FIREARM
Comp. Law No. 333.7403(1)	Comp. Law No. 750.227b
Max. Penalty Life	Max. Penalty 2 yr. consec.
Cir. Ct. No. 6th	Cir. Ct. No. 6th
Codefendants none	Codefendants none
Offense Date 5-12-86	Offense Date 5-12-86
Victim (name) N.E.T. (Relationship)	Victim (name) N.E.T. (Relationship)
Arrest Date 5-12-86	Arrest Date 5-12-86
Attorney C. Rundell Appointed Retained xx	Attorney C. Rundell Appointed Retained xx
Date of Bond N/F	Date of Bond N/F
CONVICTED BY: ☐ Plea ☐ Jury ☒ Bench ☐ Nolo Contendre ☐ HYTA ☐ Sec. 7411	CONVICTED BY: ☐ Plea ☐ Jury ☒ Bench ☐ Nolo Contendre ☐ HYTA ☐ Sec. 7411
Conviction Date 2-27-87	Conviction Date 2-27-87
Glty/Mental Ill. ☐ Yes ☒ No	Glty/Mental Ill. ☐ Yes ☒ No
Jail Credit Days 353	Jail Credit Days 353
Sentencing Judge Schnelz	Sentencing Judge Schnelz

Date Report Completed	County	Report Completed By	Caseload No.	Rec. Disp.
4-27-87	Oakland	Mary E. Asch	270	4

DISPOSITION

	TYPE OF SENTENCE (Prob., prison, HYTA delay Sec. 7411, F & C.)	SENTENCE DATE	TERMS OF SENTENCE: MINIMUM Yrs	MINIMUM Mos	MINIMUM Days	MAXIMUM Yrs	MAXIMUM Mos	FINE	COSTS	RESTIT.	COUNTY JAIL Mos	COUNTY JAIL Days
NO.1		4-30-87										
NO.2				3								

7

INVESTIGATOR'S DESCRIPTION OF THE OFFENSE:

The defendant is convicted of Count I, Possession Of Controlled Substance Over 650 Grams – Cocaine and Count II, Possession Of Firearm While Committing Felony. Two additional counts, Possession Of Controlled Substance – Cocaine Less Than Fifty Grams and Possession Of Firearm In Commission of Felony were dismissed.

This offense occurred on 5-12-86 in the vicinity of 8 Mile and Coolidge in Oak Park at approximately 5:10 a.m. On that date, police on routine patrol pulled defendant over per a routine traffic violation. Defendant, who was alone at the time, presented police with his I.D. in addition to a C.C.W. General Permit for the .38 five-shot revolver that he had on his person in an ankle holster. At this point, police observed bulges in the defendant's coat pocket and conducted a patdown of his person and discovered marijuana cigarettes, four brass cocaine straws, and one cocaine spoon, and three vials containing a white powder and suspected cocaine, twelve Percodan tablets, and twenty-five capsules later revealed to be Phendimetrazine Tartrate, a controlled substance; a Motorola beeper, and $597.78 in cash. At this point, the defendant was arrested and taken into custody.

The defendant's 1977 Ford LTD vehicle was impounded and during a police inventory of such, found in the trunk was a valise containing 672.5 grams of cocaine. Lab analysis of such revealed no dilutants detected. Also found in the valise with the cocaine was $2,900 in cash and an address book, as well as a number of personal toiletries. Police conducted a lab check of various items found in

the valise and linked such to the defendant per fingerprints.

The defendant has been held in custody since the arrest date in lieu of $500,000 bond.

According to investigators involved in this case, on the night of the instant offense, the defendant had booked a room at the Embassy Hotel in Oak Park, an area known for a high rate of drug trafficking and auto theft. The defendant is a Detroit resident, residing in the 8 Mile and Dequindre area. The defendant was also registered for a room at the Sagamore Motel in Royal Oak, since 4-18-86. Police investigation at the time of the instant offense found a seventeen year old female in the room.

Det. Jankowski of the Oak Park Police Department indicated that although the defendant has never held a viable employment and described himself as a self-employed courier, receiving and delivering, he applied and was granted a General C.C.W. Permit in Wayne County.

N.E.T. Investigators and Oak Park Police described the defendant as a large-scale drug dealer, delivering down to mid-level dealers. N.E.T. Investigators indicate that the street price of the cocaine confiscated in the instant offense from defendant is between $67,000 and $100,000.

VICTIM IMPACT:

The cocaine, defendant's jewelry and possessions, as well as $3,497.78 in cash, was confiscated by police under the Forfeiture Act.

OFFENDER'S DESCRIPTION OF THE OFFENSE:

"I was stopped for Moving Violation. At that time, I was subject to, in my opinion, an illegal search after I showed Officer that I had a gun license & gun permit. Upon search of my car, Officer searched my person (reaching hands into my pockets). He came out with coin envelope which contained some packets of cocaine & place me under arrest. The rest happened at police station where they claimed to find 670 grams of cocaine in suitcase (closed), inside of shaving kit (closed), inside of paper bag (folded up). The suitcase (over-night bag) was located inside trunk of my car."

PREVIOUS CRIMINAL RECORD:

Juvenile	None known; overage for check.
Adult	Per Michigan State Police, Detroit Police Department, and F.B.I.:
5-12-86	Oak Park P.D.; Ct. I, Possession Of Controlled Substance – Cocaine Over 650 Grams/Ct. II, Felony Firearm/Ct. III, Possession Of Controlled Substance Less Than 50 Grams/Ct. IV, Felony Firearm. Convicted of Counts I and II, and Counts III and IV dismissed. Instant offense.

MARRIAGE & FAMILY:

Mother	Shirley Mae McDonald nee Friedland. Defendant claims he does not know where his mother lives. He did claim she formerly resided on South Reed in Runnymead, New Jersey for approximately 10 years until 1984.

Father — Morton Harmelin; died in 1965 at age 64 of heart attack in Pennsaulkin, New Jersey. He had formerly been employed as a sales rep for a beauty supply firm.

Brother — Paul J. Harmelin, age 46; resides at unknown address, per defendant, in New Jersey. High school principal. Graduate of Philadelphia College Museum of Art.

Sister — Susan B. Harmelin, age 32; whereabouts unknown. Defendant claims she resides with his mother. Formerly secretary in Atlantic City.

Defendant is the second of three children born to his parents' union and raised in Philadelphia, Pennsylvania until the age of six, at which time he claimed the family relocated to South Jersey, Hadden Heights, and subsequently Sommerdale, New Jersey in Camden County. The defendant graduated in June of 1983 from Sterling High School in Sommerdale, ranking 92 out of 133. At this time, his family resided at 8 Glouster, Sommerdale, New Jersey. After graduating, defendant entered the U.S. Air Force and claims he was stationed in Washington, D.C. at Bolling A.F.B., where he was an Honor Guard. In 1967, he claims he was Honorably Discharged, Rank E-4, from the Air Force. Defendant claims to be single and denied paternity of children. He indicated he relocated to Detroit approximately eight years ago. At the time of the instant offense, he claims he was residing alone in an apartment at 20481 Flemming, Apt. 14, Detroit.

EMPLOYMENT & ECONOMIC STATUS:

Defendant has no known legitimate employment. He claims he is self-employed as a courier, delivering gambling money. He then classified himself as a pool player and indicated that he relocated to Detroit to pool-hustle. He claims he earns $500 to $800 a week cash playing pool. The defendant does not file income tax. It should be noted defendant was granted a General C.C.W. Gun Permit in Wayne County in January of 1986, claiming he needed such for business, as he was a courier.

Defendant claims no assets or liabilities. He has retained his attorney for $15,000, who has been paid in full by an associate of the defendant's, Ed White, according to police investigation.

Upon arrest in the instant offense, police confiscated from defendant $597.78 cash which was on his person and $2,900 in cash which was in the overnight bag in the truck of his vehicle, where the drugs were found. Also confiscated was defendant's 1977 LTD Ford, a Taurus .38 special revolver with ammunition and ankle holster, two gold chains which defendant was wearing value $100, one cloverleaf pendant and one eagle pendant valued at $100, one gold bracelet valued at $100, one gold cigarette lighter valued at $50, one Motorola beeper valued at $100, all on defendant's person.

SUBSTANCE ABUSE:

Defendant claims he has never used narcotic drugs other than Percodan, which he claims he began using in 2-1986 until his arrest in the instant offense, 5-1986. He claims he

was using seven Percodan tablets per day, had no prescription for such, and used due to a toothache and his fear of dentists. He claims he suffered withdrawal symptoms when incarcerated in the instant offense. He also acknowledged use of marijuana. The defendant denied drug trafficking; however, in addition to the cocaine confiscated from defendant, he also had on his person upon arrest four brass cocaine straws, one cocaine spoon, and a brass cigarette case containing six marijuana cigarettes and 25 capsules of Phendimetrazine Tartrate, a controlled substance. Also confiscated was $3,497.78 in U.S. Currency.

MENTAL & PHYSICAL HEALTH:

The defendant is in good physical health and has not been hospitalized for any illnesses or diseases recently.

IN THE OAKLAND COUNTY CIRCUIT COURT,
PONTIAC, MICHIGAN

(Caption Omitted in Printing)

[2] Pontiac, Michigan
Thursday, April 30, 1987

THE COURT: Mr. Spiekerman?

MR. SPIEKERMAN: Thank you. May it please the Court, Your Honor, Charles Spiekerman on behalf of the People.

I would at this time like to call the case of the People versus Ronald Harmelin. It is file number CR. 86-73784.

Your Honor, Mr. Harmelin was convicted at bench trial on February 27th of this year by Your Honor, and sentencing was originally scheduled for March but had to be adjourned to get a pre-sentence report until today's date. Defendant was convicted of Count I, which is possession with intent to deliver of more than six hundred and fifty grams of a controlled substance, to-wit: Cocaine, which carries a mandatory sentence of life, and Count II, possession of a firearm during the commission of a felony, which carries a mandatory sentence of two years incarceration.

Your Honor, defendant is here to be sentenced on the two counts.

MR. RUNDELL: May it please the Court, Curtis [3] Rundell appearing on behalf of the respondent who, of course, is here for sentencing.

The record should reflect this is the adjourned date for sentencing. Defendant is prepared to proceed to sentencing. I have had an opportunity to go through the pre-

sentence report. As to the factual allegations only, I have no difficulty with them. I believe them to be accurate.

As to any other commentary, Your Honor tried this case without a jury. You know as much about this case as anyone is going to know, period, and so I'm sure the Court will not be affected by that. I think the sentence is mandatory. The defendant understands that, and the defendant is prepared for sentencing.

THE COURT: Is there anything, Mr. Harmelin, sir, you'd like to say before I sentence you, sir?

DEFENDANT HARMELIN: No, sir.

THE COURT: Then the Court, as Mr. Rundell points out, has no discretion in connection with this matter. The sentences in connection with the charge are mandatory, and I will sentence you therefore accordingly.

In connection with the possession of a controlled substance over six hundred and fifty grams, to-wit: Cocaine, I sentence you to the mandatory life in [4] connection with this with credit for three hundred and fifty-three days served to date.

In addition, in connection with the felony firearm, and this must be consecutive as I understand it, I sentence you to the two-year mandatory for the possession of a firearm in the commission of a felony.

There are no guidelines, no criteria necessary.

Mr. Rundell, you had something you wanted to add, sir?

MR. RUNDELL: Yes, Your Honor. It may be moot, although it may not be, but nevertheless as I understand

the law, the felony firearm sentence is one which must be served first with the consecutive sentence being on the life.

MR. SPIEKERMAN: That is correct, Your Honor.

MR. RUNDELL: My question, I guess, is to which sentence do we apply the three hundred and fifty-three days of jail time.

THE COURT: Actually, in essence, the three, fifty-three, I guess, would go to the two-year mandatory portion.

* * *

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v RONALD ALLEN HARMELIN, Defendant-Appellant.	)	JAN 09 1989 No. 101536

Before: Wahls, P.J., Hood and N.J. Kaufman*, JJ.

PER CURIAM

Defendant, Ronald Allen Harmelin, was convicted after a bench trial of possession of 650 or more grams of cocaine, MCL 333.7403(2)(i); MSA 14.15 (7403)(2)(i), and felony-firearm, MCL 750.227b; MSA 28.424(2), and was sentenced on April 30, 1987, by the Oakland Circuit Court to a mandatory life term of imprisonment for the cocaine conviction and a mandatory two-year term of imprisonment for the felony-firearm conviction. On appeal, defendant argues that his convictions must be reversed because the evidence against him was obtained as a result of an unconstitutional seizure and pat-down search of his person and an unconstitutional search of his car; that his convictions must be reversed because he was deprived of the effective assistance of counsel; and that his sentence

* Retired Court of Appeals judge, sitting on the Court of Appeals by assignment.

for the cocaine conviction must be set aside and a resentencing occur because a mandatory life sentence without the possibility of parole constittutes [sic] cruel and unusual punishment. We find that defendant's convictions must be reversed because the evidence used against him was obtained as a result of an unconstitutional seizure of his person.

The record reveals that in the early morning hours of May 12, 1986, two Oak Park police officers, Calvin Rix and Lawrence Blakeney, were patrolling in a marked police car in the area of the Embassy Motel in the City of Oak Park, and at 2:45 a.m. drove into the motel's parking lot to check for stolen vehicles. Numerous stolen vehicles had been found in this lot in the past. At this time, the officers observed defendant's car exiting the parking lot, and although they were called away on other police business at various times that morning, they saw defendant's car entering the Embassy Motel parking lot at about 4:00 a.m. and again at 5:00 a.m. In the three sightings of defendant's car, the officers noticed nothing unusual or illegal in the manner in which defendant's car was being driven.

Shortly after 5:00 a.m., while continuing to patrol the area around the Embassy Motel, Officers Rix and Blakeney saw defendant's car make a U-turn at the intersection of Eight Mile and Hubbell Roads, a high-crime area, without stopping for a red light. When the officers, in their patrol car with its overhead lights flashing, pulled behind defendant's vehicle, defendant responded by stopping in a reasonably prompt fashion. Officer Rix walked to the driver's side of defendant's car, while Officer Blakeney positioned himself at the passenger side

of the car. Defendant, who remained seated in his car, complied in a cooperative manner upon being requested by Officer Rix to produce a driver's license and vehicle registration. Defendant then stepped out of his car. Neither of the officers could recall whether defendant was ordered out of his vehicle or whether he got out of it on his own initiative, although Officer Rix testified that if he did in fact order defendant out of the car, that order would have been prompted solely by the nervous behavior exhibited by defendant – behavior described as defendant's having "trouble getting some of the words out." In any event, after exiting his car, defendant, in a nervous manner, informed Officer Rix that he was carrying a pistol concealed in an ankle holster. He explained that he had a permit for the weapon, however, and that he did not want the officers to become alarmed. He then handed Officer Rix a general permit to carry a concealed weapon as well as a safety inspection certificate for the .38 caliber, five-shot revolver, which was later found in his ankle holster.

After looking at the firearm documents proffered by defendant, Officer Rix observed nothing which suggested that the papers were possibly invalid. Nonetheless, because defendant appeared to be nervous, because he was armed, albeit legally, and because he had a bulge in one of his coat pockets, Officer Rix, fearing for his own safety and sensing that "[t]here was something wrong," decided to conduct a pat-down search of defendant. In doing so, some marijuana was discovered, and defendant was placed under arrest.

In searching defendant after his arrest, the officers found other incriminating evidence in defendant's possession, including assorted pills and capsules, three vials of white powder, ten baggies of white powder, drug paraphernalia and a telephone beeper. Later, pursuant to the standard policy of the Oak Park police department, defendant's car was impounded for a possible forfeiture action, and an inventory search was conducted. During this search, a satchel containing a shaving-kit bag was discovered in the trunk. The kit contained $2900 in cash and two bags of white powder subsequently determined to be 672.5 grams of cocaine. A fingerprint expert testified that defendant's fingerprints were found on books located inside the satchel and next to the bags of cocaine.

Defendant neither testified in his own behalf nor presented any witnesses.

On appeal, defendant first argues that the detention and pat-down search conducted by the police violated his Fourth Amendment right to be secure against unreasonable seizures and did not fall within the stop-and-frisk exception to the warrant requirement first enunciated in *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), because the detention and search could not be justified by any articulable suspicion or objective manifestation that he was engaged, or about to be engaged, in criminal activity. In *Terry*, the *locus classicus* of stop-and-frisk law, the United States Supreme Court created a limited exception to the requirement of showing probable cause in the seizure of a person by a police officer if the officer had a reasonable, articulable suspicion that the person committed, or was about to commit, a crime. Under the *Terry*

rule, once an officer has reasonably concluded that criminal activity may be afoot, he can conduct a pat-down search if he reasonably concludes that the person seized may be armed and dangerous. See *People v Payton*, 166 Mich App 428, 430-431; 421 NW2d 191 (1988); *People v Peyton*, 167 Mich App 230, 236-237; 421 NW2d 643 (1988). In the present case, defendant, prior to trial, moved to suppress the narcotics evidence against him on the ground that the detention and pat-down search to which he was subjected violated his Fourth Amendment rights. Of course, it is well established that evidence derived from an illegal seizure must be suppressed as the "fruit of the poisonous tree." *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963); *People v. Shabaz*, 424 Mich 42, 65; 378 NW2d 451 (1985), cert dis ___ US ___; 106 S Ct 3326; ___ L Ed 2d ___ (1986). The trial court denied defendant's pretrial suppression motion. This Court will not disturb a trial court's ruling on a suppression motion unless that ruling is clearly erroneous. *Payton, supra*, p 430; *Peyton, supra*, p 235; *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1986). We will find such a ruling clearly erroneous if firmly convinced that a mistake has been made. *People v Daniels*, 160 Mich App 614, 617; 408 NW2d 398 (1987).

In the present case, defendant, without doubt, was lawfully stopped for running a red light, which is a civil infraction, MCL 257.611; MSA 9.2311; *People v Laube*, 154 Mich App 400, 407; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987). It seems fairly clear that after defendant was lawfully stopped and produced his driver's license and vehicle registration, Officer Rix ordered defendant to get out of his car. Although defendant did not testify, and

thus did not inform the court that he was in fact ordered out of his car, and although Officer Rix could not remember whether he ordered defendant out of his car or whether defendant exited the automobile of his own accord, it seems highly unlikely to us that, under the circumstances presented in this case, defendant would have gotten out of his car without being told to do so. The question thus becomes whether this escalation in the intrusiveness of the stop was justified by the traffic violation alone and, if not, whether the additional detention was supported by a reasonable, articulable basis on the part of the police for suspecting criminal activity. We are mindful, during our examination of this matter, that "the intrusiveness of the police activity must be carefully limited to the circumstances justifying the detention." *Burrell, supra*, 457.

With respect to the Fourth Amendment of the United States Constitution, the reasonableness of requesting a driver to get out of a vehicle following a lawful traffic stop has been answered by the United States Supreme Court in *Pennsylvania v Mimms*, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977). In *Mimms*, a majority of the Supreme court held that a police officer's order to a driver to exit his car after the car was lawfully stopped for a traffic violation did not violate the Fourth Amendment, even though the officer had no reason to suspect foul play at the time, since the obvious interest in the officer's safety outweighed the *de minimus* intrusion involved in what was described as "at most a mere inconvenience" to the driver. 98 S Ct 333. The *Mimms* majority noted that, according to one study, approximately 30% of police shootings occurred when a police officer

approached a suspect seated in an automobile and that the hazard of accidental injury from passing traffic to an officer standing on the driver's side of a stopped vehicle may also be appreciable in some situations. Accordingly, under federal law, once a police officer has stopped a vehicle for a traffic violation he has the authority, without more, to order the driver out of the car.

In the dissent in *Mimms* written by Justice Stevens and in which Justices Brennan and Marshall joined, it is stated that "[t]he Court has based its legal ruling on a factual assumption about police safety that is dubious at best [and] . . . has created an entirely new legal standard of justification for intrusions on the liberty of the citizen." 98 S Ct 337. Regarding the majority's reliance on one study's statistical finding that "approximately 30% of all police shootings occurred when the police officer approached a suspect seated in an automobile," 98 S Ct 333, Justice Stevens stated:

"That statement does not fairly characterize the study to which it refers. Moreover, the study does not indicate that police officers can minimize the risk of being shot by ordering drivers stopped for routine traffic violations out of their cars. The study reviewed 110 selected police shootings that occurred in 1959, 1960, and 1961.[7] In 35 of those cases, 'officers were attempting to investigate, control, or pursue suspects who were in automobiles.'[8] Within the group of 35 cases, there were examples of officers who 'were shot through the windshield or car body while their vehicle was moving'; examples in which 'the officer was shot while dismounting from his vehicle or while approaching the suspect[']s vehicle'; and, apparently, instances in which the officer was shot by a passenger in the vehicle. Bristow, [Police Officer Shootings – A Tactical Evaluation, 54 J. Crim. L.C. & P.S. 93 (1963)], n. 7, at 93.

"In only 28 of the 35 cases was the location of the suspect who shot the officer verified. In 12 of those cases the suspect was seated behind the wheel of the car, but that figure seems to include cases in which the shooting occurred before the officer had an opportunity to order the suspect to get out. In nine cases the suspect was outside the car talking to the officer when the shooting occurred.

"These figures tell us very little about the risk associated with the routine traffic stop,[9] and they lend no support to the Court's assumption that ordering the routine traffic offender out of his car significantly enhances the officer's safety. Arguably, such an order could actually aggravate the officer's danger because the fear of a search might cause a serious offender to take desperate action that would be unnecessary if he remained in the vehicle while being ticketed. Whatever the reason, it is significant that some experts in this case of human behavior strongly recommend that the police officer 'never allow the violator to get out of the car . . . '[10]

"[7] As the author pointed out, '[n]o attempt was made to obtain a random selection of these cases, as they were extremely hard to collect.' Bristow, Police Officer Shootings – A Tactical Evaluation, 54 J. Crim. L.C. & P.S. 93 (1963).

"[8] *Ibid.* Since 35 is 32% of 110, presumably this is the basis for the '30%' figure used in the Court's statement. As the text indicates, however, not all of these cases involved police officers approaching a parked vehicle. Whether any of the incidents involved routine traffic offenses, such as driving with an expired license tag, is not indicated in the study.

"[9] Over the past 10 years, more than 1,000 police officers have been murdered. FBI, Uniform Crime Reports 289 (1977). Approximately 10% of those killings, or about 11 each year, occurred during 'traffic pursuits and stops,' but it is not clear how many of those pursuits and stops involved offenses such as reckless or high-speed driving, rather than offenses such as driving on an expired license, or how often the shootings could have been avoided by ordering the driver to dismount.

"[10] '2. *Never allow the violator to get out of the car* and stand to its left. If he does get out, which should be avoided, walk him to the rear and right side of the car. Quite obviously this is a much safer area to conduct a conversation.' V. Folley, Police Patrol Techniques and Tactics 95 (1973) (emphasis in original).

"Another authority is even more explicit:

"The officer should stand slightly to the rear of the front door and doorpost. This will prevent the violator from suddenly opening the door and striking the officer. In order to thoroughly protect himself as much as possible, the officer should reach with his weak hand and push the lock button down if the window is open. This will give an indication to the driver that he is to remain inside the vehicle. It will also force the driver to turn his head to talk with the officer.

"The officer should advise the violator why he was stopped and then explain what action the officer intends to take, whether it is a verbal or written warning, or a written citation. If the suspect attempts to exit his vehicle, the officer should push the door closed, lock it, if possible, and tell the driver to 'please stay in the car!' Then he should request [the] identification he desires and request the violator to hand the material out of the window away from the vehicle. The officer should not stare at the identification but [should] return to his vehicle by backing away from the suspect car. As the patrolman backs away, he should keep his eyes on the occupant(s).

"The officer should remain outside of the patrol unit to use the radio or to write a ticket. The recommended position for him at this time would be to the right side of the patrol unit. Should the driver of the violator vehicle make exit from his seat, the officer should direct the violator to the rear center of his vehicle or the front center area of the patrol unit. Preferably, the officer should verbally attempt to get the violator to reenter and remain in the vehicle." A Yount, Vehicle Stops Manual, Misdemeanor and Felony 2-3 (1976).

"Conflicting advice is found in an earlier work, G. Payton, Patrol Procedure 298 (4th ed. 1971). It is worth noting that these authorities suggest that any danger to the officer from passing traffic may be greatly reduced by the simple and

unintrusive expedient of parking the police car behind, and two or three feet to the left of, the offender's vehicle. *Folley, supra*, at 93; *Payton, supra*, at 301; *Yount, supra* at 2." 98 S Ct 337-338.

The dissent by Justice Stevens also notes that a state is free to provide its citizens with greater protection in this matter than that afforded under the Fourth Amendment of the United States Constitution. 98 S Ct 336. It is well established that state constitutions can provide greater protections than those afforded by the federal constitution. *People v Thompson*, 424 Mich 118, 125; 379 NW2d 49 (1985).

We agree with the dissent of Justice Stevens in *Mimms* and therefore hold that a police officer, after stopping an automobile for a traffic violation, may not order the driver to exit the car, and thus protract the detention, unless the test announced in *Terry* has been fulfilled, *i.e.*, unless the officer had a reasonable, articulable suspicion that the driver committed, or was about to commit, a crime. Maintaining the *Terry* standard in situations involving traffic stops by police officers will help to ensure that the right to be free from unreasonable seizures will not wholly be eroded in traffic offense cases and, as a corollary, that citizens will not lawfully be vulnerable to unnecessary, intrusive and intimidating police commands. As observed by Justice Stevens, the risk to a police officer in the context of a legitimate traffic stop cannot be so universal as always to constitute a reasonable justification for ordering a citizen out of his car.

"The commuter on his way home to dinner, the parent driving children to school, the tourist circling the Capitol, or the family on a Sunday afternoon outing hardly pose the same threat as a driver curbed after a high-speed chase through a high-crime area late at night. Nor is it universally true that the driver's interest in remaining in the car is negligible. A woman stopped at night may fear for her own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority. Whether viewed from the standpoint of the officer's interest in his own safety, or of the citizen's interest in not being required to obey an arbitrary command, it is perfectly obvious that the millions of traffic stops that occur every year are not fungible." 98 S Ct 338.

In addition, maintaining the *Terry* standard in this context will help to avoid the arbitrary exercise of the power to force a citizen out of his car in those many, many circumstances in which there exist no suspicions for fearing the driver but, for instance, because of the political message of a bumper sticker on the car or the color of the driver's skin, the driver is nevertheless legally obliged to obey submissively the instruction of a police officer. The line between unfettered discretion and discrimination is a fine one indeed.

We are aware that the majority decision in *Mimms* has been cited by this Court with apparent approbation. In *People v Laube*, 154 Mich App 400, 408-410; 397 NW2d 325

(1986), lv den 428 Mich 856 (1987), for example, a panel of this court, citing *Mimms*, rejected an argument by the defendant that a stop for the civil infraction of walking on the shoulder of a road with, and not against, traffic, MCL 257.655, MSA 9.2355, did not authorize the stopping deputies to extend his detention or conduct a frisk. In *Laube*, however, the defendant himself "consented to, and indeed, appears to have initiated, an extended contact with the officers," and "repeatedly placed his hands in his pockets while inching towards the rear of the patrol car." 154 Mich App 410. These circumstances created a legitimate concern on behalf of the officers regarding their safety. Moreover, in *People v Blackburne*, 150 Mich App 156, 164-165; 387 NW2d 850 (1986), lv den 425 Mich 869 (1986), a panel of this Court, citing *Mimms*, found that the detaining, and pat-down searches, of the defendant and three other men were not unreasonable after the driver of the car in which the men were travelling committed a traffic violation by driving on the wrong side of the center line for a distance of about 1/8th of a mile. In *Blackburne*, however the police had reasonable, articulable suspicions that criminal activity was afoot even before stopping the car for the traffic violation. Before stopping the car and subjecting its driver and passengers to detainment, "[t]he police officers reasonably suspected that the four men in the car were engaged in drug shipment activity." 150 Mich App 164. Thus, while both *Laube* and *Blackburne* cite *Mimms*, neither case, to support its result, relies exclusively on the holding in *Mimms*.

We find added support in *People v Burrell*, 417 Mich 439; 339 NW2d 403 (1983), for our conclusion that the Michigan constitutional provision regarding freedom

from unreasonable searches and seizures, Const 1963, art 1, § 11, affords more protection to individuals such as the present defendant than that provided under federal constitutional law. In *Burrell*, the defendant's vehicle was legitimately stopped by police for violation of a statute prohibiting excessively noisy exhaust systems, MCL 257.707; MSA 9.2407. This legitimate stop revealed that the driver had no driver's license or vehicle registration. Thus, the police reasonably suspected that the vehicle was stolen. The Supreme Court, stressing that the intrusiveness of police activity must be carefully limited to the circumstances justifying the detention, found that the police were able to detain the defendants only so long as to write citations for the noisy exhaust system and – after determining by way of a LEIN check that the driver was licensed and that the car was not reported as stolen – the driver's failure to have in his possession a valid driver's license. The Court stated:

"Analytically, given this state of facts, it is clear that more than one roadside detention occurred. Initially, driver Brown was properly stopped for an equipment violation. A detention following a stop for such a minor violation would be justified only for the length of time necessary to write a citation. Here, however, the stop immediately revealed a new set of circumstances, a driver without either a operator's license or a vehicle registration. We agree that it was reasonable to suspect that the vehicle was stolen, and we also agree that detention was justified long enough to resolve the suspicion raised. When the LEIN check verified that Brown was licensed and that the car was not reported stolen, that suspicion expired. By 7:15 p.m., detention, again, could be justified

only for the length of time required for Blackport to write a citation for Brown's failure to have a valid driver's license in his possession while driving."

Although this statement concerns only the duration of a detention, it is clearly implied that the manner of a detention should be no more intrusive than that necessary to address the issue or issues justifying the detention in the first place. In this regard, the Supreme Court made the following observations and statements:

"In [*United States v*] *Brignoni-Ponce*, [422 US 873, 881-882; 95 S Ct 2574; 45 L Ed 2d 607 (1975)], the United Supreme Court applied the *Terry* 'stop and frisk' doctrine to investigatory stops of automobiles by a roving border patrol. The Court condemned a random stop of a vehicle made because its three passengers appeared to be of Mexican descent. The Court concluded that appearance alone was an insufficient basis to allow a random stop and brief questioning. This result flowed naturally from the *Terry* requirement that more than 'inchoate and unparticularized suspicion or 'hunch' ' was necessary to justify a frisk of a suspicious individual.

* * *

"In *Delaware v Prouse*, [440 US 648; 99 S Ct 1391; 59 L Ed 2d 660 (1979)], the Court required that a police officer who stops and detains a motorist to check for a valid driver's license and registration have at least an articulable and reasonable suspicion that the motorist is unlicensed or that the vehicle is not registered. The officer in the case testified that he had not observed traffic or equipment violations or any suspicious activity prior to

making the stop. The Court ruled that his stop was unreasonable.

"In the instant case, we do not deal with any improper stop. Therefore, neither *Brignoni-Ponce* nor *Delaware v Prouse* is dispositive. However, since a stop almost inevitably leads to a brief detention for questioning, we draw guidance from these decisions as to the standard applicable to a brief detention *on an unrelated matter* following an otherwise lawful stop. Proceeding from the premise that a brief detention is at least as intrusive for Fourth Amendment purposes as a stop, we conclude that a brief detention for questioning is permissible if based on a reasonable and articulable suspicion of criminal activity.

"Since fourth Amendment rights are involved in a detention, however brief, the intrusiveness of the police activity must be carefully limited to the circumstances justifying the detention." (Footnotes omitted; emphasis in original.) 417 Mich 455-457.

The evidence in the present case is clear that Officer Rix had no reasonable, articulable suspicion that defendant was engaged in criminal activity at the time he, presumably, was ordered out of his car. At that time, Officer Rix knew that defendant's car had frequently gone in and out of a motel parking lot during the early morning hours of May 12, 1986; that numerous stolen cars had been found in the parking lot in the past; that defendant had illegally run a red light in a high-crime area; and that defendant complied in a cooperative manner upon being requested to produce his driver's license and vehicle registration. We fail to see how any "specific

reasonable inferences of criminal activity could possibly be drawn from these facts." *Burrell, supra,* p 458. Either taken singly or *in toto,* they suggest to us nothing particularly nefarious, illicit, improper or illegal. It is only after defendant got out of his car that questions of safety arose, *i.e.,* it was only after defendant got out of his car that defendant began acting nervously, displayed a bulge in a coat pocket, and produced a gun, for which he possessed a facially valid general permit and safety inspection certificate. This latter evidence, however, was discovered only after the police escalated defendant's detention from that of a mere traffic citation incident to something more. Applicable here is the *Burrell* Court's observation that, "rather than having a crime and looking for the criminal[], the police, here, had the 'criminal[]' and were looking for the crime." 417 Mich 459. While the results of such police activity may – and in this case, were – very efficacious, such ends, in a constitutional matter as that now in issue, cannot justify the means employed. As also noted by the Supreme Court in *Burrell,* it is of course painful to suppress otherwise good and highly incriminating evidence that led to a defendant's conviction, but the loss of that evidence "is balanced by the fact that it is only in difficult situations such as those presented here that we can draw the fine lines between the authority of the police to protect us from crime and the use by the police of governmental power to violate our constitutional rights." *Id.*

Accordingly, having reviewed the entire record in this case, we are firmly convinced that the trial court erred in denying defendant's pretrial motion to suppress the narcotics evidence used against him at trial because we are unable to find specific facts which would support

a reasonable suspicion of criminal activity sufficient to justify ordering defendant out of his car after being stopped for a simple traffic violation. Since the incriminating evidence in this case was the fruit of an illegal detention effected by the police, it should have been suppressed. *Wong Sun, supra; Shabez, supra.*

In light of our decision to reverse defendant's convictions on the basis of his illegal detention, the other issues he raises on appeal need not be addressed. *Burrell, supra,* p 460, n 30.

Reversed.

/s/ Myron H. Wahls
/s/ Harold Hood

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

No. 101536

v

RONALD ALLEN HARMELIN,

Defendant-Appellant.

Before: Wahls, P.J., and Hood and N.J. Kaufman,* JJ.

N.J. Kaufman, J. (dissenting)

I vigorously disagree with the majority's hinging review of this case on the assumption that Officers Rix and Blakeney ordered defendant out of his car. The record reflects that neither officer could recall whether defendant was ordered out of his car or whether defendant simply got out on his own initiative, and defendant did not testify.

Unlike the majority, I do not find it in the least unlikely that defendant would have exited his car without being told to do so. To the contrary, given the contraband contained in the trunk of defendant's car, I find it very understandable that defendant would get out and as far away from his car as he could. The majority's assumption concerning defendant's actions is justified by neither the record nor defendant's brief on appeal, the later of which is void of any reference to the theory adopted by the majority.

Clearly, defendant was lawfully stopped for running a red light, a civil infraction, MCL 257.611; MSA 9.2311. *People v Burrell,* 417 Mich 439, 450; 339 NW2d 403 (1983); *People v Laube,* 154 Mich App 400, 407; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987). The police officers, in conducting the pat-down search, must have concluded that defendant was armed and dangerous based on a specific, articulable, reasonable inference drawn from the facts for the frisk to have been a reasonable intrusion upon defendant's Fourth Amendment rights. *Terry v Ohio,*

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

392 US 1, 32; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *Michigan v Summers*, 452 US 692; 101 S Ct 2587; 69 L Ed 2d 340 (1981); *People v Backburne*, 150 Mich App 156, 164; 387 NW2d 850 (1986), lv den 425 Mich 869 (1986).

In this case, defendant volunteered the fact that he was carrying a gun, for which he had a general permit, in a holster strapped to his ankle. Seeing what he believed were several bulges in defendant's coat, Officer Rix suspected that defendant was carrying other undisclosed weapons on his person. This suspicion was enhanced by defendant's extremely nervous demeanor and their location in a high crime area, and Officer Rix became concerned for his own safety. Although these facts may not justify a pat-down search if considered separately, when considered together the pat-down search was a justifiable intrusion upon defendant's Fourth Amendment rights. The purpose of the pat-down search was not to discover evidence of a crime, but to protect the officers from harm by seizing suspected weapon or weapons. *Terry*, 392 US 23; *Adams v Williams*, 407 US 143, 146; 92 S Ct 1921, 1923; 32 L Ed 2d 612, 617 (1972); *Pennsylvania v Mimms*, 434 US 106, 110; 98 S Ct 330, 333; 54 L Ed 2d 331, 336-337 (1977); and *Ybarra v Illinois*, 444 US 85, 93; 100 S Ct 338, 343; 62 L Ed 2d 238, 247 (1979).

There is no need to strain for reversal by following the dissent in *Mimms*, as the majority in this case has done, because the *Terry* test was met: the officers had a reasonable, articulable suspicion that defendant was armed and a danger to their safety.

Nor do any of defendant's four other claims on appeal require reversal.

First, defendant argues that his right not to be compelled to testify against himself was violated when Officer Rix asked him about the hard object felt in defendant's chest pocket. This conversation took place prior to defendant's arrest. Officer Rix believed the hard object was another gun, and asked defendant what it was. Defendant replied that it was his marijuana. The limited constraint conferred upon defendant's freedom by the officers conducting the pat-down search does not rise to the level of a custodial interrogation, and precludes a finding that defendant's admission was compelled by police action. *People v Hill*, 429 Mich 382, 397; 415 NW2d 193 (1987).

Second, the warrantless search of defendant's car was not an unjustifiable intrusion upon defendant's Fourth Amendment rights such that the fruits of this search should have been suppressed. Defendant's car was properly impounded under the forfeiture provisions on the Controlled Substance Act, MCL 333.7522; MSA 14.15(7522). However, because the officers' testimony established that the Oak Park Police Department's standardized procedure did not mandate searching and conducting an inventory of the contents of every container within the vehicle, the inventory search done in this case does not fall within the parameters of *Colorado v Bertine*, 479 US ___; 107 S Ct 738; 93 L Ed 2d 739 (1987); *People v Krezen*, 427 Mich 681; 397 NW2d 803 (1986).

I would find that the search in this case falls under the automobile exception to the warrant requirement enunciated in *United States v Ross*, 456 US 789; 102 S Ct 2157; 72 L Ed 2d 572 (1982), and adopted by this Court in *People v Cruz*, 161 Mich App 238, 241-242; 409 NW2d 797

(1987), lv den 430 Mich 854 (1988). Ten clear plastic bags filled with white powder, three small vials containing white powder, assorted pills and capsules, paraphernalia of the type used to ingest cocaine, and a telephone paging device were retrieved from defendant's person after his arrest, and a gun was strapped to defendant's ankle when the officers stopped him. These facts would lead a reasonably prudent person, thus police had a probable cause, to believe that defendant's car contained more controlled substances. *People v Goins*, 164 Mich App 559, 560; 417 NW2d 499 (1987). Although the trial court's denial of the suppression motion was not based on the automobile exception to the warrant requirement, reversal is not mandated where the trial court reaches the right result for the wrong reasons. *People v Beckley*, 161 Mich App 120, 131; 409 NW2d 759 (1987), lv gtd on other grds 430 Mich 857 (1988).

Third, under either the Michigan or federal standard,[1] defendant's claims that he was deprive of the effective assistance of counsel and the right to plead not guilty because (1) his trial counsel offered no evidence in response to the prosecutor's case-in-chief, but solely confined the defense to attacking the admissibility of evidence found on defendant's person and in his car, and (2) counsel did not argue that defendant was not guilty of knowingly possessing the cocaine found in his truck, are both without merit. The evidence against defendant was overwhelming, and counsel's strategy in concentrating the defense on the admissibility of the disputed evidence focused upon defendant's best and only chance of acquittal. This choice of strategy was not the functional equivalent of a guilty plea proscribed in *People v Schulz*, 85 Mich

App 527; 271 NW2d 305 (1978), and defendant was afforded his constitutional right to plead not guilty. *People v Fisher*, 119 Mich App 445; 326 NW2d 537 (1982).

Defendant's last claim is that the mandatory sentence of life imprisonment is entirely out of proportion to the seriousness of his crime and constitutes a cruel and unusual punishment proscribed by US Const, Am VIII, and Const 1963, art 1, § 16. I disagree. See *People v Harding*, 163 Mich App 298, 329; 413 NW2d 777 (1987), vacated on other grds 430 Mich 858-859 (1988).

I would affirm defendant's convictions and sentence.

/s/ Nathan J. Kaufman

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[1] *People v Garcia*, 398 Mich 250; 247 NW2d 547 (1976), sets forth the Michigan standard; the federal standard is set forth in *Strickland v Washington*, 446 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and was applied in *People v Dalessandro*, 165 Mich App 569, 574-575; 419 NW2d 609 (1988)

COURT OF APPEALS, STATE OF MICHIGAN

ORDER

(Caption Omitted In Printing)

Myron H. Wahls

Presiding Judge

Harold Hood
Nathan J. Kaufman

Judges

This Court having issued a judgment in this case on January 9, 1989, and precedent, uncited by the parties, affecting the analysis of an issue in that judgment having come to the attention of the Court,

IT IS ORDERED, on the Court's own motion, that the January 9, 1989, judgment is vacated, the decision to publish is reversed, and the case is retained for the issuance of a judgment on reconsideration.

/s/ Harold Hood

STATE OF MICHIGAN

COURT OF APPEALS

(Caption Omitted In Printing)

April 18, 1989
FOR PUBLICATION
No. 101536
(On Reconsideration)

Before: Wahls, P.J., Hood and N.J. Kaufman*, JJ.

PER CURIAM.

On March 9, 1989, this Court, on its own motion, vacated its judgment in this case issued on January 9, 1989, and retained the matter for reconsideration. Of concern was the effect of a constitutional provision and its case-law precedent, uncited by the parties, on the issue of the propriety of a police officer ordering a driver out of his car after having stopped the driver for a traffic violation. Two judges of this panel concluded that the Michigan Constitution's search-and-seizure provison provided greater protection to drivers in such a situation than that available under the analogous provision of the federal constitution. Under the latter, a police officer's order to a driver to exit his car after the car has been lawfully stopped for a traffic violation does not violate the Fourth Amendment even though the officer had no reason to suspect foul play at the time. *Pennsylvania v Mimms*, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977).

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*Retired Court of Appeals judge, sitting on the Court of Appeals by assignment.

The third judge of this panel, writing in dissent, concluded that the record did not support the assumption that defendant was ordered out of his car by the police and, on the contrary, suggested that defendant had voluntarily gotten out of his car after having been lawfully stopped for a traffic violation.

On reconsideration, we hold that, even if defendant in this case were ordered out of his car by the police after having been legally stopped for a traffic violation, the narcotics evidence revealed after subsequent searches could not have been suppressed from evidence under the Michigan Constitution's search-and-seizure provision because, under the circumstances in this case, the provision affords defendant with no greater protection than that provided under the analogous federal provision in the Fourth Amendment. Regarding the remaining issues raised by defendant on appeal and not addressed in the January 9, 1989, majority opinion, we adopt the reasoning and conclusions set forth in the dissenting opinion of that date.

The facts in this case were recited in our earlier opinion:

> "Defendant, Ronald Allen Harmelin, was convicted after a bench trial of possession of 650 or more grams of cocaine, MCL 333.7403(2)(i); MSA 14.15 (7403)(2)(i), and felony-firearm, MCL 750.227b; MSA 28.424(2), and was sentenced on April 30, 1987, by the Oakland Circuit Court to a mandatory life term of imprisonment for the cocaine conviction and a mandatory two-year term of imprisonment for the felony-firearm conviction. On appeal, defendant argues that his convictions must be reversed because the evidence against him was obtained as a result of an

> unconstitutional seizure and pat-down search of his person and an unconstitutional search of his car; that his convictions must be reversed because he was deprived of the effective assistance of counsel; and that his sentence for the cocaine conviction must be set aside and a resentencing occur because a mandatory life sentence without the possibility of parole constitutes cruel and unusual punishment. . . .
>
> "The record reveals that in the early morning hours of May 12, 1986, two Oak Park police officers, Calvin Rix and Lawrence Blakeney, were patrolling in a marked police car in the area of the Embassy Motel in the City of Oak Park, and at 2:45 a.m. drove into the motel's parking lot to check for stolen vehicles. Numerous stolen vehicles had been found in this lot in the past. At this time, the officers observed defendant's car exiting the parking lot, and although they were called away on other police business at various times that morning, they saw defendant's car entering the Embassy Motel parking lot at about 4:00 a.m. and again at 5:00 a.m. In the three sightings of defendant's car, the officers noticed nothing unusual or illegal in the manner in which defendant's car was being driven.
>
> "Shortly after 5:00 a.m., while continuing to patrol the area around the Embassy Motel, Officers Rix and Blakeney saw defendant's car make a U-turn at the intersection of Eight Mile and Hubbell Roads, a high-crime area, without stopping for a red light. When the officers, in their patrol car with its overhead lights flashing, pulled behind defendant's vehicle, defendant responded by stopping in a reasonably prompt fashion. Officer Rix walked to the driver's side of defendant's car, while Officer Blakeney positioned himself at the passenger side of the car. Defendant, who remained seated in his car,

complied in a cooperative manner upon being requested by Officer Rix to produce a driver's license and vehicle registration. Defendant then stepped out of his car. Neither of the officers could recall whether defendant was ordered out of his vehicle or whether he got out of it on his own initiative, although Officer Rix testified that if he did in fact order defendant out of the car, that order would have been prompted solely by the nervous behavior exhibited by defendant – behavior described as defendant's having "trouble getting some of the words out." In any event, after exiting his car, defendant, in a nervous manner, informed Officer Rix that he was carrying a pistol concealed in an ankle holster. He explained that he had a permit for the weapon, however, and that he did not want the officers to become alarmed. He then handed Officer Rix a general permit to carry a concealed weapon as well as a safety inspection certificate for the .38 caliber, five-shot revolver, which was later found in his ankle holster.

"After looking at the firearm documents proffered by defendant, Officer Rix observed nothing which suggested that the papers were possibly invalid. Nonetheless, because defendant appeared to be nervous, because he was armed, albeit legally, and because he had a bulge in one of his coat pockets, Officer Rix, fearing for his own safety and sensing that "[t]here was something wrong," decided to conduct a pat-down search of defendant. In doing so, some marijuana was discovered, and defendant was placed under arrest.

"In searching defendant after his arrest, the officers found other incriminating evidence in defendant's possession, including assorted pills and capsules, three vials of white powder, ten baggies of white power, drug paraphernalia and

a telephone beeper. Later, pursuant to the standard policy of the Oak Park Police Department, defendant's car was impounded for a possible forfeiture action, and an inventory search was conducted. During this search, a satchel containing a shaving-kit bag was discovered in the trunk. The kit contained $2900 in cash and two bags of white power subsequently determined to be 672.5 grams of cocaine. A fingerprint expert testified that defendant's fingerprints were found on books located inside the satchel and next to the bags of cocaine.

"Defendant neither testified in his own behalf nor presented any witnesses."

In our earlier opinion, we recognized that in *Mimms, supra*, a majority of the United States Supreme Court held that a police officer's order to a driver to get out of his car after the car was lawfully stopped for a traffic violation did not violate the Fourth Amendment, even though the officer had no reason to suspect foul play at the time, and that other panels of this Court have cited *Mimms* with approbation, *People v. Laube*, 154 Mich App 400, 408-410; 397 NW2d 325 (1986), lv den 428 Mich 856 (1987); *People v. Blackburne*, 150 Mich App 156, 164-165; 387 NW2d 850 (1986), lv den 425 Mich 869 (1986). Nevertheless, we decided in our earlier opinion that, under the Michigan Constitution's search-and-seizure provision, a driver such as defendant in the present case should be afforded more protection from the police than is afforded under the Fourth Amendment's prohibition against unreasonable searches and seizures. In doing so, we followed the dissent of Justice Stevens in *Mimms*, and thus declared that a police officer, after stopping an automobile for a traffic violation, could not order the driver to

get out of the car, and thus protract the driver's detention, unless the test announced in *Terry v. Ohio*, 391 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), had been fulfilled, i.e., unless the officer had a reasonable, articulable suspicion that the driver committed, or was about to commit, a crime. We opined the maintaining the *Terry* standard in situations involving traffic stops by police officers would help to ensure that the right to be free from unreasonable seizures would not be wholly eroded in traffic offense cases and, as a corollary, that citizens would not lawfully be vulnerable to unnecessary, intrusive, and intimidating police commands.

On reconsideration, we find that whether Justice Stevens, in his dissent in *Mimms*, had the better argument on this issue is not controlling because in this case we are obliged to follow the majority decision in *Mimms*. The search-and-seizure provision in the Michigan Constitution provides:

> "The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation. *The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.*" (Emphasis added.) Const 1963, art 1, §11.

The language of this section itself specifies that the protections granted under the section shall not be construed to bar from evidence any narcotic drug seized by a police

officer outside the cartilage of a house. In this case, since the evidence was seized from defendant by the police on the open highway, and therefore outside the curtilage of a house, the protections granted under the state's search-and-seizure provision are not available to defendant. Instead, defendant is entitled only to those protections available to him under the federal constitution. *See People v. Catania*, 427 Mich 447, 466, n 12; 398 NW2d 343 (1986); *People v. Ragland*, 149 Mich App 277, 281; 385 NW2d 772 (1986); *People v. Alfafara*, 140 Mich App 551, 560-561; 364 NW2d 743 (1985). And, as already stated, under federal law, the police were entitled to order defendant out of his car after it was lawfully stopped for a traffic violation. *Mimms, supra.*

After defendant's automobile was lawfully stopped for a traffic violation and after defendant was lawfully ordered out of his car, it is clear that a pat-down search of his person was warranted under the *Terry* standard, i.e., it was reasonable to conclude that criminal activity might have been afoot and that defendant might have been armed and dangerous. *See People v. Payton*, 166 Mich App 428, 430-431; 421 NW2d 191 (1988); *People v. Peyton*, 167 Mich App 230, 236-237; 421 NW2d 643 (1988). Defendant, in a high crime area during early morning hours, was admittedly carrying a pistol in an ankle holster, appeared to be extremely nervous, and had a bulge in one of his coat pockets which led the arresting officer to believe that defendant could have been carrying a second concealed weapon. Fearing for his safety and for that of his partner, and believing that, "[i]f [defendant] had, in fact, guns in his pockets where the bulges were, they could have been used on me, and I wouldn't have had a chance to

respond," the officer conducted a pat-down search on defendant.

In the present case, defendant, prior to trial, moved to suppress the narcotics evidence against him on the ground that the detention and pat-down search to which he was subjected violated his Fourth Amendment rights. It is well established that evidence derived from an illegal seizure must be suppressed as the "fruit of the poisonous tree." *Wong Sun v. United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963); *People v. Shabaz*, 424 Mich 42, 65; 378 NW2d 451 (1985), cert dis 478 US 1017; 106 S Ct 3326; 92 L Ed 2d 733 (1986). The trial court denied defendant's pre-trial suppression motion. This Court will not disturb a trial court's ruling on a suppression motion unless the ruling is clearly erroneous. *Payton, supra*, p 430; *Peyton, supra*, p 235; *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). We will find such a ruling clearly erroneous if firmly convinced that a mistake has been made. *People v Daniels*, 160 Mich App 614, 617; 408 NW2d 398 (1987). We discern no reason to disturb the trial court's ruling in this case.

Regarding the remaining issues raised on appeal by defendant, we agree with the reasoning and conclusions set forth in the dissenting opinion filed with our January 9, 1989, decision. We will review very briefly each of those issues.

First, defendant argues that his right not to be compelled to testify against himself was violated when Officer Rix asked him about the hard object felt in defendant's chest pocket. This conversation took place prior to defendant's arrest. Officer Rix believed that the

hard object was another gun and asked defendant what it was. Defendant replied that it was marijuana. The limited constraint placed upon defendant's freedom by the officer conducting the pat-down search does not rise to the level of a custodial interrogation and precludes a finding that defendant's admission was compelled by police action. *People v. Hill*, 429 Mich 382, 397; 415 NW2d 193 (1987).

Second, the warrantless search of defendant's car was not an unjustifiable intrusion upon his Fourth Amendment rights such that the fruits of this search should have been suppressed. Defendant's car was properly impounded under the forfeiture provisions of the Controlled Substances Act, MCL 333.7522; MSA 14.15 (7522). However, because the officers' testimony in the present case established that the Oak Park Police Department's standardized procedures did not mandate searching and conducting an inventory of the contents of every container within an impounded vehicle such as defendant's, the inventory search done in this case does not fall within the parameters of *Colorado v Bertine*, 479 US ___; 107 S Ct 738; 93 L Ed 2d 739 (1987); *People v. Krezen*, 427 Mich 681; 397 NW2d 803 (1986).

Nevertheless, we find that the search in this case falls within the automobile exception to the warrant requirement enunciated in *United States v Ross*, 456 US 789; 102 S Ct 2157; 72 L Ed 2d 572 (1982); and adopted by this Court in *People v Cruz.*, 161 Mich App 238, 241-242; 409 NW2d 797 (1987), lv den 430 Mich 854 (1988). Ten clear plastic bags filled with white powder, three small vials containing white powder, assorted pills and capsules, paraphernalia of the type used to facilitate the ingestion of

cocaine, and a telephone paging device were retrieved from defendant's person after his arrest. Moreover, a gun was strapped to defendant's ankle when he was stopped by the officers. These facts establish probable cause to believe that defendant's car contained more controlled substances. Probable cause exists when the facts and circumstances warrant a person of reasonable prudence to believe that the evidence of a crime or contraband sought is in a stated place. *People v. Goins*, 164 Mich App 559, 560; 417 NW2d 499 (1987). Although the trial court's denial of the suppression motion was not based on the automobile exception to the warrant requirement, reversal is not mandated where the trial court reaches the right result for the wrong reason. *People v Beckley*, 161 Mich App 120, 131; 409 NW2d 759 (1987), lv gtd on other grds 430 Mich 857 (1988).

Third, under either the Michigan or federal standard,[2] defendant's claims that he was deprived of the effective assistance of counsel and the right to plead not guilty because (1) his trial counsel offered no evidence in response to the prosecutor's case-in-chief, but solely confined the defense to attacking the admissibility of evidence found on defendant's person and in his car, and (2) counsel did not argue that defendant was not guilty of knowingly possessing the cocaine found in his trunk, are both without merit. The evidence against defendant was overwhelming, the counsel's strategy in concentrating the defense on the admissibility of the disputed evidence focused upon defendant's best and only change of acquittal. This choice of strategy was not the functional equivalent of a guilty plea, and defendant was afforded his constitutional right to plead not guilty. *People v. Schulz*, 85

Mich App 527; 271 NW2d 305 (1978); *People v. Fisher*, 119 Mich App 445; 326 NW2d 537 (1982).

Defendant's last claim is that the mandatory sentence of life imprisonment is entirely out of proportion to the seriousness of his crime and constitutes a cruel and unusual punishment proscribed by US Const, Am VIII, and Const 1963, art 1, §16. We disagree. See *People v Harding*, 163 Mich App 298, 329; 413 NW2d 777 (1987), vacated on other grounds 430 Mich 859 (1988).

Affirmed.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Nathan J. Kaufman

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[1] *People v Garcia*, 398 Mich 250; 247 NW2d 547 (1976), sets forth the long-accepted Michigan standard; the federal standard is set forth in *Strickland v Washington*, 446 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and was applied in *People v Dalessandro*, 165 Mich App 569, 574-575; 419 NW2d 609 (1988), to a claim brought under the Michigan Constitution.

COURT OF APPEALS, STATE OF MICHIGAN

ORDER

People v Ronald Allen Harmelin

Docket # 101536

L. C. # 86 73784

Myron H. Wahls
Presiding Judge

Harold Hood
Nathan J. Kaufman
Judges

The Court orders that the motion for rehearing is DENIED.

A true copy entered and certified by Norbert G. Jaworski, Chief Clerk, on

[SEAL]

April 18, 1989
Date

/s/ Norbert G. Jaworski
Chief Clerk

Michigan Supreme Court
Lansing, Michigan

Order

Entered: January 29, 1990

86374&(45)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD HARMELIN,

Defendant-Appellant.

SC: 86374
COA: 101536
LC: 86-73784-FH

On order of the Court, the delayed application for leave to appeal and the motion for remand are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

January 29, 1990

/s/ Corbin R. Davis
Clerk

SUPREME COURT OF THE UNITED STATES

No. 89-7272

Ronald Allen Harmelin,

Petitioner

v.

Michigan

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of Michigan.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question III presented by the petition.

May 29, 1990